

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband)	WC Docket No. 17-84
Deployment by Removing Barriers)	
to Infrastructure Investment)	
)	

**Comments of
Communications Workers of America**

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EXECUTIVE SUMMARY

High-speed broadband is the essential infrastructure of the 21st century, providing the platform for economic development, jobs, education, health care, public safety, energy efficiency, civil participation, and communications among friends and family. Since launching our Speed Matters program a decade ago, the Communications Workers of America (CWA) has supported regulatory policies that accelerate deployment of affordable, high-speed broadband to all Americans while protecting consumers, public safety, universal service, and good jobs during and after the transition to new networks. Over the past decade, the United States has made substantial progress spurring hundreds of billions of dollars in private sector investment in high-speed broadband. Yet, significant gaps remain: 34 million Americans still do not have access to broadband at the Commission's 25/3 Mbps speed, 88 million households lack competitive choice for high-speed broadband, and one-quarter of all Americans, including nearly half (47 percent) of low-income households do not subscribe to broadband, many because they cannot afford it.¹

There is much the Commission can do to accelerate private sector investment in high-speed networks, close the digital divide, and promote digital inclusion. But the policy proposals in this *NPRM*, *NOI*, and *Request for Comment* have nothing to do with accelerating broadband investment, and everything to do with allowing broadband providers to weaken or eliminate essential consumer protections, endanger public and worker safety, and undermine universal service obligations. Ironically, the proposed rule changes could make it more difficult to achieve the very goals the Commission claims for this proceeding. Reducing consumer protections and education during technology transitions could increase copper customers' resistance to change

¹ Federal Communications Commission, *2016 Broadband Progress Report*, Jan. 29, 2016 (for broadband access data; for 88 million household figure, CWA calculation based on Table 6); Pew Research Center, "Internet/Broadband Fact Sheet." Jan. 12, 2017 (for broadband subscriber data).

for fear that copper retirement or landline discontinuance will leave them worse off while allowing carriers to neglect their copper networks – which typically provide DSL broadband connections – without an adequate replacement.

The Commission’s recent *Technology Transitions* rulemakings carefully balance the public interest in facilitating the transition from the legacy public switched telephone network (PSTN) to more advanced technologies while at the same time preserving essential consumer and public safety protections. The rules promulgated in those proceedings should be preserved, if not strengthened to protect the Commission’s enduring values for communications services: public safety, consumer protection, universal service, and competition. As then-Commissioner and now-Chairman Ajit Pai wrote in 2014 when the Commission formally endorsed those values: “[W]e cannot just turn off the PSTN overnight... [N]o one can be left behind – and today, we declare that ‘no consumer [may] lose [] access to service or critical functionalities’ and that residential and business customers must receive ‘clear, timely, and sufficient notice...’”

CWA urges the Commission to retain the existing Technology Transition rules. Our comments focus on the following provisions that serve to facilitate private sector investment in and public adoption of advanced broadband infrastructure while fostering the Commission’s enduring values of public safety, universal service, consumer protection, and competition during and after the technology transitions.

- 1. Pole Attachments.** The Commission should reject “one-touch, make-ready” proposals that would allow third parties to move the equipment belonging to other providers on utility poles. “One-touch, make-ready” provisions short-circuit safe processes, leave third parties and their contractors without accountability for poor or unsafe work, and violate legally-binding collective bargaining agreements, eliminating good, career jobs in the community. The Commission should maintain its current time frames governing pole attachments or, in the alternative, ensure that any changes in the timelines are sufficient to

complete all aspects of the work (survey, cost estimate, make-ready, and inspection) safely and accurately.

2. **Copper Retirement.** The Commission should retain the retail customer 90-day advance notification of copper-to-fiber migration. Clear, timely, and sufficient advance notice facilitates network upgrades by giving consumers the information and time they need to prepare for change. The Commission should maintain *de facto* retirement in its definition of copper retirement as a deterrent to incumbent LECs' failure to maintain copper networks and as an incentive to upgrade those networks to fiber.
3. **Preemption of State and Local Laws.** State laws that require incumbent carriers to maintain adequate facilities and equipment serve to further Commission broadband goals by requiring incumbent LECs to improve copper networks, which deliver DSL service, and encouraging incumbent carriers to upgrade to fiber if this is the most cost-effective method to ensure quality service. Moreover, Commission preemption of state and local statutes regarding management of and payment for the use of public rights-of-way and facilities would violate the plan language of Sections 253(b) and (c) of the Communications Act and override the decisions of democratically elected state and local officials who have the responsibility to safeguard public property and public safety.
4. **Functional Equivalent Test.** Congress enacted Section 214(a) of the Communications Act to make sure that the people in communities that have relied on a particular service are not harmed by its discontinuance, reduction, or impairment of that service. That task is a critical part of encouraging technology transitions. The Commission's "functional test" correctly assesses the circumstances of the affected community to determine whether a replacement service exists. Stripping down the Section 214 protections would be a dangerous disservice to communities, particularly small towns and rural areas, where a functionally equivalent alternative may not be available.

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I. INTRODUCTION

The Communications Workers of America (“CWA”) submits these comments in response to the Commission’s Public Notice in the *2017 Wireline Infrastructure Notice of Proposed Rulemaking (NPRM), Notice of Inquiry (NOI), and Request for Comment*.² CWA represents 700,000 workers in private and public sector employment who work in telecommunications and information technology, the airline industry, news media, broadcast and cable television, education, health care and public service, law enforcement, manufacturing and other fields. CWA members have a direct interest in this proceeding as workers and consumers.

The Commission’s recent *Technology Transitions* rulemakings carefully balance the public interest in facilitating the transition from the legacy public switched telephone network (PSTN) to more advanced technologies while at the same time preserving essential consumer and public safety protections. The rules promulgated in those proceedings should be preserved, if not strengthened. In the *2014 Technology Transitions Order*, the Commission reaffirmed its obligation to protect and enhance the core statutory and enduring values of public safety, universal access, consumer protection, and competition during and after the transition from legacy systems to new advanced technologies.³ In the *2015 Copper Retirement Order*, the Commission adopted 90-day advance notification rules that apply when incumbent carriers transfer retail customers from copper-to-fiber networks, thereby facilitating the transition by

² Wireline Competition Bureau Announces Deadlines for Filing Comments and Reply Comments in the Wireline Infrastructure Proceeding, *Public Notice*, DA-17-473, May 16, 2017. *See also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comments*, WC Docket No. 17-84, April 21, 2017 (“*2017 Wireline Infrastructure NPRM*”).

³ *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition et al*, Order, Report and Order and Further Notice of Proposed Rulemaking, GN Docket Nos. 13-5 and 12-353 et al., Jan. 31, 2014 (rel), at 3-24, 37-72 (“*2014 Technology Transitions Order*”).

giving consumers the information and time they need to prepare for the network change.⁴ In the *2014 Declaratory Ruling* and *2016 Service Discontinuance Order*, the Commission – having learned from public outrage when Verizon attempted to substitute inferior fixed wireless Voice Link for storm-damaged landline service on Fire Island NY – clarified the criteria it will use when incumbent carriers petition under Section 214(a) of the Communications Act to discontinue their landline service, ensuring that voice customers will continue to have access to critical services after the discontinuance.⁵ Finally, in the *2011 Pole Attachment Order*, the Commission established rules to facilitate new entrant installation of equipment on utility poles while safeguarding public and worker safety.⁶ These rules are working to facilitate private sector investment in and public adoption of advanced broadband infrastructure while fostering the Commission’s enduring values of public safety, universal service, consumer protection, and competition during and after the technology transitions. Last year alone, the five largest incumbent LECs invested \$46.7 billion in capital expenditures as consumers increasingly adopted new technologies.⁷ They should be retained, if not strengthened.

⁴ *In the Matter of Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, et al, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*, GN Docket 13-5, RM-11358 et al., Aug. 7, 2015 (rel) (“*2015 Copper Retirement Order*”).

⁵ *2014 Technology Transitions NPRM and Declaratory Ruling*, GN Docket No. 13-5 et al., Nov. 25, 2014 (rel), 114-118; *Technology Transitions, USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, Declaratory Ruling, Second Report and Order and Order on Reconsideration*, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, July 15, 2016 (rel) (“*2016 Service Discontinuance Order*”).

⁶ *In the Matter of Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration*, WC Docket No. 07-245, April 7, 2011 (“*2011 Pole Attachment Order*”).

⁷ SEC Forms 10-K for AT&T, Verizon, CenturyLink, Frontier, and Windstream for the year ending Dec. 31, 2017.

II. POLE ATTACHMENT RULES MUST CONTINUE TO PROTECT PUBLIC AND WORKER SAFETY

The *NPRM* seeks comment on whether reforms to the Commission’s pole attachment rules are necessary to remove barriers to broadband deployment, and if reforms are necessary, how to ensure that changes in pole attachment processes protect the safety of workers and the general public.⁸ As the Commission notes, pole attachments are a key input for many broadband deployment projects and concern for worker and public safety must be paramount.⁹ Pole attachment work is complex and, if done incorrectly, can lead to dangerous conditions for workers and the public. Unskilled work could leave heavy terminals and wires hanging without the proper support. Ungrounded wires could pose electrocution risks. Incorrect placement or overloading equipment on damaged or decaying poles could lead to poles falling in the public right-of-way. Skilled, properly trained workers who know the equipment, the condition of the poles, and safe practices can best protect public and worker safety. The Commission should reject proposals such as “one-touch, make-ready” that seek to short-circuit safe processes. Above all, Commission rules cannot violate existing collective bargaining agreements and undermine good, career jobs in the telecommunications industry.

CWA represents outside plant technicians who do make-ready work for incumbent local exchange carriers (“incumbent LECs”). In many locations, CWA also represents workers who prepare surveys, cost estimates, and complete inspections of pole attachment work. Career company employees are in the best position to do the work safely and properly; they know the equipment, the condition of the poles, the rules regulating attachment placement, and have been

⁸ 2017 Wireline Broadband *NPRM* at 3.

⁹ *Id.* at 6.

properly trained. Moreover, because workers are on the frontlines of the telecommunications industry – responding to consumer needs, building and maintaining networks, ensuring safety and quality service – their perspective provides valuable insight in response to the Commission’s proposals.

One-Touch, Make-Ready. First and foremost, the Commission should refrain from adopting rules that would allow new attachers themselves or their utility-approved contractors to perform work on existing attachers’ facilities. One-Touch, Make-Ready (“OTMR”) ordinances, such as those adopted by some local authorities, prioritize speed over safety and quality service, circumventing necessary processes currently in place and often leaving third parties and their contractors without accountability for poor or unsafe work. Reports from CWA members in the field disclose a wide array of safety and service issues caused by third parties, who often employ contractors without the training or experience to complete the work properly. Workers report instances of ungrounded strands, causing electrocution risk to the public and other workers. Others report third party contractors using weak bolts to secure heavy cables. Weak bolts could come loose over time and the cable could fall, possibly into a public right-of-way. When asked to explain how he would report a safety concern like a weak bolt, one CWA-represented inspector at a major incumbent LEC explained that he would report the concern to his supervisor, who would then attempt to contact the third party or its contractor. It is often the case that the third party or contractor cannot be reached. The existing attacher would then be responsible to remedy the safety concern. All too frequently, third parties or their contractors simply cannot be held accountable for poor or unsafe work. Unlike a contractor employed directly by the existing attacher, a third party or its contractor cannot be docked fees until the work is done right or lose

future contracts as a result of substandard or unsafe work. In the end, it is the existing attachers who often fix the shoddy work of third parties to ensure their own customers' quality service, workers' safety, and public safety.

In addition, One-Touch, Make-Ready (OTMR) eliminates or provides insufficient time for vital parts of the pole attachment process. The Commission cites make-ready ordinances adopted by local authorities in Nashville, TN and Louisville, KY. In those locations, there is no requirement that the new attacher submit a pole attachment application, nor is time provided for the pole owner(s) or existing attacher(s) to provide a cost estimate for the work. In Louisville, KY, where the city government adopted a OTMR ordinance in February 2016, the new attacher is not required to notify existing attachers before "routine" work of removing, altering, or relocating existing attachers' facilities is done. And the new attacher defines "routine" work.¹⁰ In Nashville, TN, where the city government adopted an OTMR ordinance in September 2016, the ordinance requires a mere 15 days advance notice that a "utility-approved contractor" will be doing make-ready work and provides the existing attacher only 30 days to complete "complex work" before giving the new attacher the right to do the work itself or with its own contractors.¹¹ CWA members report that it is vital to give the existing attacher adequate time for a complete and thorough survey of poles before new attachers can attach their facilities. "You can't just have people jumping up poles," one engineering associate said. "It puts the integrity of the poles in jeopardy, endangering the public and other workers who might have to climb the pole later." Many utility poles are already overloaded, and many poles require replacement before additional facilities are attached. The shorter timelines for make-ready work suggested by the Commission

¹⁰ Louisville Metro Ordinance No. O-427-15, § 116.72.

are insufficient to do essential make-ready work and the Commission should not look to OTMR ordinances as models for reform.

In addition, One-Touch, Make-Ready proposals would infringe on longstanding collective bargaining agreements that give jurisdiction over make-ready work to CWA-represented employees. The Commission must not adopt rules that would violate these contract provisions. For example, a collective bargaining agreement between CWA District 3 and AT&T Southeast (d/b/a BellSouth Telecommunications) includes Article 14, a provision that has been in the agreement for decades.¹² In Article 14, BellSouth agrees “to use only Company employees on work involving the construction, maintenance, removal and/or repair of the following types of plant: All aerial outside plant...underground cable and splicing of buried cable...equipment which constitutes any part of a communication circuit.”¹³ CWA District 3 Vice President Richard Honeycutt explains in an Affidavit attached to the CWA *amicus* brief filed in BellSouth’s lawsuit seeking relief from Louisville’s OTMR ordinance, “Article 14 is of critical importance to CWA, as it protects the integrity of the bargaining unit and the integrity of the telecommunications circuit from which CWA-represented employees earn their living. [...] Louisville’s [OTMR] ordinance threatens the right of CWA employees to perform the work that is reserved to them by contract with BellSouth.”¹⁴ CWA and Verizon New York also have a

¹¹ Metro Nashville Ordinance No. BL2016-343, § 13.18.020.

¹² Agreement between Communications Workers of America and BellSouth Telecommunications, LLC, effective Aug. 9, 2015 – Aug. 3, 2019. *See also* Communications Workers of America, Motion for Leave to Appear as *Amicus Curia*, *BellSouth Telecommunications, LLC v. Louisville/Jefferson County Metro Government*, Case No. 3:16-CV-124-TBR (filed Mar. 8, 2016).

¹³ Article 14, Agreement between Communications Workers of America and BellSouth Telecommunications, LLC, effective Aug. 9, 2015 – Aug. 3, 2019

¹⁴ Declaration of Richard Honeycutt in *BellSouth Telecommunications, LLC v. Louisville/Jefferson County Metro Government*, Case No. 3:16-CV-124-TBR.

contractual Letter of Agreement that obligates Verizon New York to use CWA-represented employees to perform make-ready work. The agreement – dating back to 1974 – states: “The Company believes that pole and aerial cable work normally should be performed by Company employees.”¹⁵ Allowing third-parties or their contractors to do make-ready work violates the legally binding contracts negotiated between CWA and our employers, and undermines good, career jobs in communities across the United States. The Commission must not adopt make-ready rules that infringe on collective bargaining agreements, and by extension violate the rights of the workers who bargained them.

Pole Attachment Timeframes. The Commission should maintain its current timeframes governing pole attachments or, in the alternative, ensure that any changes to the steps in the pole attachment process – application review including survey, cost estimate, make-ready moving of the equipment, and inspection – provide sufficient time to perform the work safely and properly. According to frontline CWA members who perform survey, cost estimate, make-ready, and inspection work, the shorter timeframes suggested by the Commission are not sufficient to complete their work safely and accurately. A CWA-represented engineering associate who surveys poles notes that, while shortening the application review timeframe for wireline work to 15-30 days for small or medium orders and 45 days for large orders might theoretically be possible under ideal conditions, the reality of on-the-ground work makes the shortened timeframe unrealistic. While a worker may be able to survey 15 poles per hour, increased work pressures from understaffed companies and the state of a deteriorating plant often means it will take twice

¹⁵ Letter of Agreement between Communications Workers of America and New York Telephone (predecessor to Verizon), dated Aug. 11, 1974. This letter of agreement has been renewed in every subsequent contract, most recently in the CWA/Verizon NY collective bargaining agreement signed May 29, 2016.

as long as it would under ideal conditions. Moreover, shortened timeframes would push other work to the back of the queue. As such, the Commission should not reduce the timelines governing pole attachment processes or, in the alternative, must ensure that there is adequate time to complete each step (application review, cost estimate, make-ready work, and inspection) accurately, safely, and thoroughly. The Commission cannot permit shortcuts when worker and public safety is at stake.

III. COPPER RETIREMENT NOTIFICATION PROCESS MUST CONTINUE TO PROVIDE RETAIL CONSUMERS CLEAR, TIMELY, AND SUFFICIENT ADVANCE NOTICE AND RETAIN *DE FACTO* RETIREMENT IN THE COPPER RETIREMENT DEFINITION

The *NPRM* seeks comment on whether the Commission should repeal the retail advance notice requirements adopted in the *2015 Copper Retirement Order*¹⁶ and return to the prior network change notification rules¹⁷ that required no advance notice to retail customers of copper retirement.¹⁸ In addition, the *NPRM* asks whether there is a difference between copper retirement and other network changes that require less notice. Further, the *NPRM* seeks comment on whether the Commission should retain the expanded definition of copper retirement to include *de*

¹⁶ 47 U.S.C. § 51.332

¹⁷ 47 U.S.C. § 51.333.

¹⁸ The Commission also seeks comment on advance notification requirements to wholesale customers. In these comments, we focus on retail customer advance notification requirements.

We note that the Commission distinguishes between *copper retirement* which it defines as a change in network facilities that does not “discontinue, reduce, or impair the services provided” (for example, copper to fiber network change) and “*service discontinuance*” which results in the “discontinuance, reduction, or impairment” of a service (for example, the discontinuance of wireline service altogether, such as Verizon’s discontinuance of landline service in Fire Island NY). Copper retirement requires advance notification, but does not require Commission approval. Service discontinuance requires Commission approval, per section 214 of the Communications Act. A copper retirement can also be a service discontinuance (such as a wireline to wireless network change.) See *2015 Copper Retirement Order* at 5 and 14.

facto retirement, i.e. “the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling.”¹⁹

Copper retirement is indeed different in magnitude and impact than other short-term network changes. As the Commission noted in adopting the 2015 rules, “given the accelerated pace of copper retirement...we find that consumers are directly affected in ways they had not been at the time the Commission adopted the copper retirement rules in the *Triennial Review Order* which only required posting network change on the provider’s website.”²⁰ By providing consumers the information and time they need to prepare, the Section 51.322 retail advance notice requirements are working to facilitate a smoother copper-to-fiber migration than would take place absent these advance notice requirements. Further, the expanded definition of copper retirement which includes *de facto* retirement provides critical protection to consumers who continue to depend upon copper networks for essential voice and DSL Internet service.

A. The 2015 Copper Retirement retail advance notice rules provide consumers time to prepare for change and do not prevent local exchange carriers from implementing copper-to-fiber migration in a timely fashion

In adopting the *2015 Copper Retirement Order*, the Commission reasoned that advance notification to retail customers “allows for a smoother transition by minimizing the potential for consumer complaints arising out of a lack of understanding regarding the planned network change.”²¹ The Commission noted that “there remains a segment of the population, however comparatively small, that is resistant to changes in technology...and that will benefit from

¹⁹ *2017 Wireline Broadband NPRM* at 57-69. The *NPRM* also seeks comment on other proposed changes to copper retirement rules. In general CWA supports retention of existing copper retirement rules. In particular, CWA opposes changes to Section 68.110(b) that would eliminate advance notification requirements to individuals with disabilities of network change that would impact terminal equipment upon which these individuals depend. *2017 Wireline Broadband NPRM* at 70.

²⁰ *2015 Copper Retirement Order* at 42.

information that might ease the transition or allow them to seek another provider.” Further, the Commission emphasized that “while we do not establish an approval process for copper retirement that would disrupt technological advancement, neither can we ignore the benefits afforded to consumers from receiving information regarding planned network changes that may affect the service to which they subscribe.” Above all, the Commission continued, “we must ensure that the most vulnerable populations of consumers do not fall through the cracks.”²² CWA agrees.

The *2015 Copper Retirement* rules took effect on March 24, 2016, just over one year ago. The evidence clearly indicates that the retail advance notice rules are working to achieve “the correct balance between minimizing the impact on incumbent LECs fiber deployment plans and ensuring that consumers are informed about how they will be impacted.”²³ Among the incumbent LECs, Verizon Communications has built the most extensive fiber-to-the-home (FTTH) network and has been the most aggressive in the copper-to-fiber migration. Since the rules took effect on March 24, 2016, Verizon has filed with the Commission 39 separate notices of copper retirement including 2,631 pages that list millions of specific addresses in the eight states of Delaware, Massachusetts, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia where the company plans to retire its copper network.²⁴ One day alone – February 28, 2017 – Verizon filed 13 separate notices for seven states (DE, MD, MA, NJ, NY, PA, and VA) that included 819 pages of 550,000 distinct addresses where Verizon plans to retire its copper

²¹ *Id.* at 39.

²² *Id.* at 43.

²³ *Id.* at 43.

²⁴ CWA calculation of Verizon copper retirement notices filed March 24, 2016 through June 1, 2017. Verizon copper retirement notices are available at <http://www.verizon.com/about/terms-conditions/network-disclosures>.

network.²⁵ Clearly, the retail advance notification requirements have not blocked Verizon's plans to migrate customers from copper to fiber. There is no reason to believe that as other incumbent LECs ramp up their fiber deployment and implement copper-to-fiber migration that their experience will be any different.²⁶

At the same time, consumers need clear, timely, and sufficient advance notice of copper retirement. In these comments we cite two examples – one from New Jersey, the other from Maryland – that illustrate the importance of clear, timely, and sufficient advance notice to consumers. Advance notice reduces customer confusion, gives consumers time to prepare for change, and ensures that legacy telephone customers are not left without vital voice and related services (such as medical alert and security alarm services) during and after a copper-to-fiber migration. CWA emphasizes that while most services (such as medical alert and home security) are available over fiber facilities, it takes time for customers to notify service providers, obtain, and install the equipment needed to make the services function over fiber. This is particularly the case when many homes and businesses in a community rely on the same provider for a particular service, such as security monitoring.

New Jersey. In February 2016, one month before the Commission's retail advance notice rules took effect, the New Jersey Division of Rate Counsel filed a Petition for FCC Review of

²⁵ "Verizon Files New Batch of Notifications on Copper Retirements, Fiber Replacements," *Communications Daily*, March 2, 2017. *See also* "Verizon Files Flurry of Copper Retirement Notifications as Part of Fiber Migration," *Communications Daily*, Sept. 19, 2016.

²⁶ Fully transparent advance notification of copper-to-fiber migration eases the transition for consumers and strengthens the economics of fiber deployment. CWA has filed complaints at the FCC and the Maryland Public Service Commission against Verizon's deceptive "Fiber is the Only Fix" forced migration policy for lack of transparency to customers. *See* Letter from Vincent Trivelli to Mr. David J. Collins, Executive Secretary, Public Service Commission of Maryland, Case No. 9114 Investigation into Maryland Service Performance and Service

Verizon New Jersey’s copper network change notices. The NJ Rate Counsel noted that her office began to receive customer complaints as early as May 2015 when Verizon NJ began to send 45-day advance notice letters regarding copper-to-fiber migration under the Commission’s Section 51.333 Short Term Network Change Notification rules. The Rate Counsel explained that the majority of customers wanted more information, were very concerned about whether the fiber platform would work during power outages, and wanted to know if Verizon had a right to retire the copper network. Some customers reported service interruptions post-migration. Others complained that their medical equipment, alarms, or special equipment for people with hearing loss would not function on the fiber network. “Every time Verizon releases a new batch of scheduled copper retirement notices throughout a targeted New Jersey wire center,” the Petition noted, “Rate Counsel receives alarmed calls from Verizon wireline telephone service customers. Most of these calls are from children of elderly seniors who live by themselves and do not have duplicate telephone service and depend solely on their wireline telephone service. These customers are not tech savvy and are alarmed and confused by Verizon’s customer notification letter which advises that the subscriber has 30 days to schedule the migration to Verizon’s fiber platform or face suspension of service.” The NJ Rate Counsel concluded “that the use of a § 51.333 Short Term Notices (sic) is inappropriate and frustrates and undermines the Act’s copper retirement rules...”²⁷ While CWA cannot comment on whether the Commission’s Section 51.332 90-day retail advance notice rules have served to ameliorate customer confusion

Quality Standards and Case No. 9133 In the Matter of Appropriate Forms of Regulating Telephone Companies, May 3, 2016 and Sept. 6, 2016.

²⁷ Opposition Comments of the New Jersey Division of Rate Counsel to the Short-Term Notice Filed by Verizon New Jersey, Inc. on Its Copper Retirement Network Changes in New Jersey and Petition for Review and Reconsideration, WC Docket No. 16-33, Report No. NCD-2466, Feb. 24, 2016.

and complaints regarding copper-to-fiber migration in New Jersey, it is absolutely clear that the absence of sufficient advance notice aroused significant customer resistance that served as a deterrent to the technology transition in New Jersey.

Maryland. The Maryland experience after the *2015 Copper Retirement* rules took effect provides additional evidence that these rules provide a platform upon which state regulators, consumer advocates, and providers can work cooperatively to prepare consumers for change. In October 2016, several months after the *2015 Copper Retirement Order* took effect, the Maryland Office of People’s Counsel filed a Petition for investigation with the Maryland Public Service Commission (“MD PSC”) into Verizon Maryland’s copper retirement notices. The Petition provided evidence demonstrating that Verizon sent untimely, contradictory, and defective copper retirement notices to residential customers, including some with only seven-day advance notification before suspension of service.²⁸ The MD PSC staff concurred and recommended suspension of the retirement notices for 60 days, during which time the MD PSC directed the company to work with commission staff to address the deficiencies in the retirement notices.²⁹ CWA understands that the parties worked cooperatively to improve the language in the copper retirement notices,³⁰ demonstrating that advance notice, when properly implemented, need not serve as a barrier to copper-to-fiber migration while at the same time protecting consumers during the transition.

²⁸ Petition of the Maryland Office of People’s Counsel for an Investigation into the Copper Retirement Notices Sent by Verizon, Maryland LLC to Maryland Retail Customers and Request for Immediate Suspension of Those Notices Pending an Investigation, Oct. 28, 2016.

²⁹ Maryland Public Service Commission, Letter Re: Petition of the Office of People’s Counsel for an Investigation into the Copper Retirement Notices Sent by Verizon Maryland, LLC to Maryland Retail Customers and Request for Immediate Suspension of Those Notices Pending an Investigation, Dec. 14, 2016.

³⁰ Debbie Goldman, CWA Telecommunications Policy Director, Telephone Conversation with Joyce Lombardi, attorney with the Maryland Office of People’s Counsel, June 5, 2017.

The need for adequate advance notification of copper-to-fiber migration will intensify in the coming years as other incumbent LECs join Verizon in upgrading portions of their networks to fiber. AT&T plans to deploy fiber-to-the-home (FTTH) to at least 12.5 million customer locations by mid-2019 and, according to its most recent earnings report, has already built its all-fiber network to 4.6 million customer locations with plans to add two million more in 2017.³¹ CenturyLink has announced plans to deploy FTTH to at least three million residential customers, Frontier has more than 1.2 million FTTH connections as a result of its Verizon acquisitions, Windstream launched FTTH service in several markets in 2016, and Consolidated Communications recently announced plans to expand fiber deployment in New England (pending regulatory approval of its FairPoint acquisition).³² CWA does not believe that incumbent LECs should be required to maintain two parallel networks indefinitely, but at the same time it is clear that Commission rules that require “clear, timely, and sufficient notice” facilitate the copper-to-fiber transition by giving consumers the information and time they need to prepare for change.

B. The Commission Should Retain the Expanded Definition of Copper Retirement to Include “De Facto” Copper Retirement

In the *2015 Copper Retirement Order*, the Commission responded to extensive evidence provided by CWA, state public utility commissions, and consumer advocates of cases in which “incumbent LECs have allowed copper networks to deteriorate to the extent that the networks are

³¹ AT&T Press Release, “AT&T Reports First Quarter Earnings,” April 25, 2017 (for 2017 FTTH results and plans); AT&T SEC Form 10-K for the year ending Dec. 31, 2016, Feb. 17, 2017 (for 12.5 million deployment by mid-2019). See also *AT&T/DirectTV Order*, MB Docket No. 14-90, July 28, 2015 (rel) at 394.

³² CenturyLink Second-Quarter 2016 Earnings Results, Aug. 3, 2016; Frontier Press Release, “Frontier Communications to Acquire Verizon’s Wireline Operations in California, Florida, Texas Doubling Frontier’s Size and Driving Shareholder Value,” Feb. 5, 2015 ; Sean Buckley, “Windstream Brings 1 Gbps to 35,000 to residential, business customers in four markets,” *Fierce Telecom*, April 5, 2016; Joan Engebretson, “CEO: Consolidated FairPoint Opportunities Include Fios Gigabit Upgrades,” *Fierce Telecom*, June 2, 2017.

no longer reliable.”³³ In that proceeding, the Commission properly labeled such conditions *de facto* copper retirement, subject to the same copper retirement notice requirements as copper-to-fiber migration. For the millions of consumers who continue to rely on incumbent LECs’ copper networks, the “disabling of copper facilities through acts of commission or omission”³⁴ deprives these consumers of vital communications links and poses a threat to public safety. Because “the practice of deliberately allowing copper networks to deteriorate is harmful to competition, negatively impacting end users,” the Commission issued a stern warning in the *2016 Service Discontinuance Order* that intentional neglect of copper facilities would trigger notification responsibilities with the clear intent that “the threat of enforcement action will serve as a deterrent to *de facto* copper retirement.”³⁵

In the *Technology Transitions* proceedings, CWA submitted substantial evidence of *de facto* copper retirement. We respectfully request that our comments in those proceedings (as indicated in this footnote) be incorporated into this proceeding.³⁶ In these comments, we submit additional evidence of substantial harm caused by incumbent LECs’ *de facto* copper retirement drawn from state regulatory proceedings in New York, Maryland, Pennsylvania, New Jersey, and California. CWA has been an active participant in NY, MD, PA, and CA. In those states, we submitted hundreds of photographs to illustrate systematic neglect of incumbent LECs’ copper networks in areas where the networks have not been upgraded to fiber, detailing deteriorating cables,

³³ *2015 Copper Retirement Order* at 89, 91.

³⁴ *2015 Copper Retirement Order* at 84.

³⁵ *Copper Retirement Order* at 92.

³⁶ Comments of Communications Workers of America, *In the Matter of Technology Transitions , Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers et al*, GN Docket No. 13-5, RM-11358 et al, at 24-34 (Feb. 5, 2015); Comments of Communications Workers of America, *Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers et al., Further Notice of Proposed Rulemaking*, GN Docket No. 13-5, RM-11358 et al, at 15-22 (Oct. 20, 2015).

damaged equipment, exposed splice cases and terminals, ungrounded wires, and dangerous and damaged telephone poles. We submit a representative sample of these pictures in Attachments A1-A4. We note that in a number of cases, the incumbent LEC subsequently repaired the damaged or dangerous equipment depicted in the photograph, conditions which existed for months or years prior to the date on which the photograph was taken, but only after CWA submitted the evidence to the state Commission. Below, we detail evidence from state regulatory proceedings that demonstrate that *de facto* retirement continues to be a pervasive problem, one which requires both FCC and state oversight.

New York. In response to a petition filed by CWA, public interest organizations, and elected officials, the New York Public Service Commission (“NY PSC”) opened a proceeding in March 2016 to investigate the quality of service provided by Verizon New York to its 2.7 million copper network customers, citing evidence of deteriorating Verizon performance on service metrics and public concern about Verizon service expressed at eight statewide public hearings.³⁷ The case is currently before the NY PSC.³⁸ CWA testimony submitted in the proceeding provides extensive documentation of Verizon NY *de facto* copper retirement. CWA expert witness Susan Baldwin examined thousands of pages of confidential documents detailing the state of Verizon NY’s copper plant, and summarized her findings this way: “My detailed analysis...points to a pattern of neglect that has left the network in substandard condition...Verizon is not allocating sufficient resources to the investment, maintenance and repair of its network....Verizon’s neglect of its

³⁷ State of New York Public Service Commission, “Order Initiating Proceeding to Review New York Inc.’s Service Quality,” Case 16-C-0122, March 21, 2016 (“NYPSC Service Quality Proceeding”). All documents in this case are available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-C-0122&submit=Search>

copper network leads to lines out of service or impaired by noise or other conditions that reduce their utility to customers and, at times, pose a direct threat to the safety of those customers.”³⁹

The testimony of CWA members who recently retired from Verizon NY as outside plant technicians provides graphic description of on-the-ground policies that have resulted in systematic *de facto* copper retirement across New York State, particularly in areas where Verizon has not deployed its all-fiber network. “Verizon doesn’t replace the cables when they get damaged,” reports a retired technician from Syracuse NY. “They have us running drop wire from pole to pole to bypass the bad cable. That became the company’s standard practice in our area. Drop wire is not a substitute for cable, it’s not grounded or bonded.” Retired technicians from Utica, Manhattan, Westchester, and Putnam County all stated in their testimony that Verizon’s policy requires jerry-rigging drop wire in lieu of cable as a “Band-Aid” solution to restore service to customers. A retired Manhattan technician reports that there are so few good copper pairs in some areas that he has had to open splice boxes to split “bad” pairs to “scab together” an adequate pair to restore service. In one case in the Manhattan jewelry district, he reports, unrepaired cable failures knocked out alarm systems impacting hundreds of jewelry businesses, forcing jewelers to station tractor-trailer sized armored cars outside their businesses for protection of their valuable gems. The technicians testified that Verizon has stopped monitoring air pressure in cables to keep the water out, air pressure equipment is in a state of disrepair, and the waterlogged damaged cables lead to many instances of static on the line, intermittent outages,

³⁸ Settlement discussions among Verizon, CWA, and NY PSC staff are scheduled to begin on June 26, 2017. *See* Letter from Joseph A. Post, Deputy Counsel, Verizon NY to Kathleen H. Burgess, Secretary, and Hon. Sean Mullany, Administrative Law Judge, Case No. 16-C-0122, June 13, 2017.

³⁹ Redacted Testimony and Exhibits of Susan M. Baldwin on Behalf of the Communications Workers of America, NYPSC Service Quality Proceeding, Case 16-C-0122, March 24, 2017.

and other forms of substandard service. When Verizon puts plastic enclosures over cable openings, which it does “75% of the time” according to one retired Westchester-based technician, there is no way to keep water and rodents from damaging the cable. A retired technician from the Utica Rome area describes a Verizon training video in which Verizon managers instruct technicians that “the plant is old and deteriorating so we want you to put customers on Voice Link.” CWA Assistant to the Vice President Robert Master summarized the CWA testimony: “I have heard repeatedly from members about the ways in which the company has virtually abandoned upkeep of the legacy system, and let it age and deteriorate. I have heard a litany of complaints from every part of the state about the ways in which members are prevented by management from undertaking the kind of thorough repair and maintenance of the aging network that is necessary to ensure that customers receive consistently high quality service. And I can assure this [NY] Commission that this is an enormous source of frustration for our members.”⁴⁰

Pennsylvania. CWA, Verizon Pennsylvania, the Office of Consumer Advocate, and the Office of Small Business Advocate reached a settlement on June 2, 2017 that will require Verizon to repair and replace bad cables, defective equipment, faulty-back-up batteries, and to take down 15,000 double telephone poles.⁴¹ The settlement is the result of a CWA complaint

⁴⁰ Testimony of Herb Kushner (Manhattan), Testimony of Don Wells (Syracuse), Testimony of Colleen Munch (Utica-Rome), Testimony of Ron Mangeri (Westchester and Putnam Counties), Testimony of Robert Master (Assistant to the Vice President, CWA District One) NY Service Quality Proceeding, Case 16-C-0122, March 24, 2017.

⁴¹ Pennsylvania Public Utility Commission, Certificate of Satisfaction and Withdrawal of Formal Complaint, *Petition of Communications Workers of America for a Public, On-the-Record Commission Investigation of the Safety, Adequacy, and Reasonableness of Service Provided by Verizon Pennsylvania LLC*, Docket No. P-2015-2509336, June 2, 2017 (A copy of the Settlement Agreement is attached to the Certificate, available at <http://www.puc.state.pa.us/pcdocs/1523200.pdf>). All documents in the case can be found at http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=P-2015-2509336. See also

before the Pennsylvania Public Utility Commission (PA PUC) against Verizon for failure to maintain its copper infrastructure in violation of its statutory obligation to provide safe and adequate service to customers. CWA submitted extensive testimony – including analysis of confidential Verizon documents, photographs of deteriorating Verizon outside plant (see Attachment A-2), and testimony from James Gardler, the CWA president representing Verizon technicians in Pennsylvania, who summarizes the condition of Verizon’s copper infrastructure this way: “[P]oles that are deteriorating, including unsafe poles that remain in service; lines sagging dangerously below minimum clearance levels; cables that are not properly repaired and replaced; ungrounded, exposed wires used as a work-around because Verizon will not spend the money to replace damaged cables; damaged cabinets and splice boxes that are not repaired or replaced, allowing animals and insects to nest inside; air pressure systems that are not tested and maintained, resulting in customer outages and the hazardous exposure of lead cable to the environment; batteries in remote terminals, controlled environment vaults, and high-capacity optical cable installations that are corroding and that are not being tested and replaced, resulting in preventable telephone outages during power outages.”⁴² CWA is hopeful that the terms of the settlement agreement will begin to reverse the worst of the extensive *de facto* copper retirement in Pennsylvania in the many areas where Verizon has not deployed its all-fiber network.

New Jersey. The New Jersey Board of Public Utilities (NJ BPU) on May 31, 2017 approved a stipulation of settlement in a case filed by Cumberland County and 17 southern New Jersey

“Communications Workers of America Reaches Favorable Settlement in Verizon Copper Network Case before Pennsylvania PUC,” June 2, 2017 (<https://www.cwa-union.org/news/releases/communications-workers-of-america-reaches-favorable-settlement-in-verizon-copper>).

⁴² Direct Testimony of James J. Gardler on Behalf of Communications Workers of America, *Petition of Communications Workers of America for a Public, On-the-Record Commission Investigation of the Safety,*

towns alleging poor service quality by Verizon New Jersey due to the company's failure to maintain properly its copper landline facilities. Key provisions of the agreement include a commitment to repair or replace defective outside copper cables, conduct daily inspections of outside facilities, increase capacity to provide DSL congestion relief, fiber deployment to select towns and DSL broadband expansion and outreach to others; and customer trouble reporting.⁴³

Maryland. CWA and the Maryland Office of People's Counsel ("MD OPC") have submitted substantial evidence to the Maryland Public Service Commission ("MD PSC") of Verizon's neglect of its copper facilities and poor service quality. The CWA Request for an Investigation includes many photographs of Verizon neglect of outside plant facilities in areas in which Verizon has not deployed its all-fiber network.⁴⁴ (*See* Appendix A-3). The MD OPC Request for an Investigation, filed on Jan. 13, 2017, analyzes over 1,200 consumer complaints that indicate that "Verizon has engaged in a pattern of failing, whether by neglect or with intention, to repair and maintain facilities used to provide basic telephone service to households in Maryland." These complaints are illustrative: One complainant cited "ongoing problems with static on the line and the phone going dead for years now." Verizon technicians informed the caller that "the main line that comes down the alley behind the house is damaged and in need of a repair...but Verizon never actually repairs the problem to the main line." A customer in a non-FiOS part of

Adequacy, and Reasonableness of Service Provided by Verizon Pennsylvania LLC, Docket No. P-2015-2509336, Sept. 29, 2016.

⁴³ "N.J. Board of Public Utilities Approves Settlement Reached in Verizon Service Quality Matter filed by Cumberland County and 17 Southern New Jersey Towns," May 31, 2017 (<http://www.bpu.state.nj.us/bpu/newsroom/announcements/pdf/Verizon%20Settlement%20.pdf>).

⁴⁴ Letter from Vincent Trivelli, CWA Counsel, to Mr. David Collins, Executive Secretary, Public Service Commission of Maryland, Case No. 9114 Investigation into Maryland Service Performance and Service Quality Standards and Case No. 9133 Appropriate Forms of Regulating Telephone Companies, Nov. 16, 2015. *See also* Letter from Vincent Trivelli, CWA Counsel, to Mr. David Collins, Executive Secretary, Public Service Commission

Baltimore County reported that Verizon technicians said her problem “could not be fixed” because “all hard lines [in the area] were installed 50 years ago and now are corroding to the point where Verizon can’t fix them.” The only choice was wireless Voice Link.⁴⁵ The MD OPC received some Verizon service quality data in its limited discovery, most of which is proprietary, but the MD OPC did receive non-confidential data that shows that over 25 percent (and in some places 60 percent) of reported troubles on the line were called in again within 30 days as a repeat trouble report.⁴⁶ Repeat troubles are an indication that Verizon failed to address the underlying network problem that caused the initial trouble, such as static on the line or no dial tone, in the first place. The Maryland PSC staff reviewed Verizon’s confidential service quality data and concluded that Verizon metrics have been deteriorating over time. The Maryland PSC staff recommended ongoing monitoring of Verizon service performance over the next 12 months. A Commission decision is still pending.⁴⁷

California. Within the past year, the California Public Utilities Commission (“CA PUC”) has issued two decisions designed to address *de facto* copper retirement by the two largest incumbent LECs in California: AT&T and Frontier Communications (previously Verizon California prior to the 2016 transaction.) In August 2016, the California PUC completed a multi-year investigation into the quality of service provided by AT&T and Verizon California (now Frontier), concluding that the carriers consistently failed to meet California’s service quality benchmarks for trouble

of Maryland, Case No. 9114 Investigation into Maryland Service Performance and Service Quality Standards and Case No. 9133 In the Matter of Appropriate Forms of Regulating Telephone Companies, Feb. 16, 2016.

⁴⁵ Petition of the Maryland Office of People’s Counsel For An Investigation Into Verizon Maryland’s Provision Of Basic Local Phone Service Over Copper Or Fiber Networks, Jan. 13, 2017.

⁴⁶ Maryland Office of People’s Counsel, Public Version of the Response to the Comments on OPC’s Petition for Investigation into Verizon Maryland’s Provision of Basic Local Phone Service, June 12, 2017.

⁴⁷ Staff of the Public Service Commission of Maryland, Comments Regarding Whether It is Appropriate for the Commission to Open an Investigation into Verizon Maryland, LLC’s Service Quality, June 1, 2017.

reporting and timely repair. To ensure that these carriers meet their obligations to provide quality service to customers, the California PUC adopted more granular service quality reporting requirements (that take effect after first quarter 2017) and imposed automatic fines for failure to meet trouble report, repair time, and call answer time metrics.⁴⁸

In January 2017, the California PUC issued a *Decision on Rural Call Completion Issues*, with a particular focus on 911 access and dial tone. The CA PUC concluded that “facilities driven issues ranging from maintenance issues to fiber cuts” were among the factors that contributed to network outages, and noted that in the course of its investigation it “received comments about severely degraded service characterized by recurring outages or very poor call quality” and information about “poor maintenance of poles, wires, and facilities associated with service deterioration and outages.”⁴⁹ At a public hearing in rural Guerneville, CWA described an AT&T location where “telephone plant was not grounded and was not properly installed. A tree took down cable and instead of replacing the damaged cable, the old cable was simply reattached to new poles, and over the course of four to six months, as technicians were called out to customer after customer after customer having problems in that neighborhood, it was determined that these sections of cable that had the damage occur to them were defective.”⁵⁰ The CA PUC heard complaints from customers who were told that their carrier was not repairing landline service or would make technological upgrades in the future, leaving the customer with service outages and

⁴⁸ California Public Utilities Commission, Decision Adopting General Order 133-D, Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules, Rulemaking 11-12-001, Aug. 29, 2016

(http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/155082.PDF)

⁴⁹ California Public Utilities Commission, Decision on Rural Call Completion Issues, Other Call Completion Issues and Call Initiation Issues including Lack of 911 Access and Dial Tone, *Order Instituting Investigation to Address Intrastate Rural Call Completion Issues*, Investigation 14-05-012, Jan. 4, 2017 at 12, 13, and 97.

(<http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M171/K301/171301678.PDF>).

poor to intermittent service. “My phone goes out many times in the winter,” reported one resident of rural Calaveras County. “I have to drive 40 minutes down the road to find a cell service to report the outage.”⁵¹ Based on its extensive investigation, the CA PUC *Decision on Rural Call Completion Issues* adopted more stringent outage reporting requirements.⁵²

This brief review of state regulatory action in five states illustrates that, absent public oversight, incumbent carriers will continue to engage in *de facto* copper retirement. In areas where these carriers have not deployed more advanced technologies – not only rural areas and small towns but also major cities including Buffalo, Syracuse, Albany, and Baltimore – customers experience loss of dial tone, static on the lines, frequent outages, and slow or non-existent DSL Internet service. Our brief review focuses on these five states where state legislatures have not yet taken away public oversight over communications services and where responsible regulatory commissions have responded to public pressure to enforce statutory and regulatory provisions to protect the public’s interest in quality communications service. As we discuss below, the vast majority of state regulatory commissions no longer have the authority or shirk their responsibility to take such action. Therefore, the FCC continues to have an important role to play in protecting the millions of consumers who continue to rely on the legacy copper network. By including *de facto* retirement in its advance notification rules, the Commission serves notice on incumbent carriers that it will not tolerate systematic neglect of legacy systems, a policy that has the potential ancillary benefit of encouraging carriers to upgrade to fiber where this is the most cost-effective method to ensure quality communications services.

⁵⁰ *Id.* at 99.

⁵¹ *Id.* at 101.

⁵² *Id.* at 1-7.

IV. THE COMMISSION SHOULD NOT PREEMPT STATE AND LOCAL LAWS AS A MATTER OF LAW AND POLICY

In the *Notice of Inquiry (NOI)*, the Commission seeks comment on whether it should enact rules, consistent with its authority under Section 253 of the Act, to promote deployment of broadband infrastructure by preempting certain state and local laws.⁵³ CWA urges extreme caution in this area. The types of state and local laws that the *NOI* raises for consideration – deployment moratoria, rights-of-way negotiation and approval processes, fees and other costs, permitting and licensing, service quality and copper maintenance requirements, among others – fall squarely under the authority granted to state and local governments in Sections 253(b) and (c) of the Communications Act. Section 253(b) of the Act protects state sovereignty to “impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”⁵⁴ Section 253(c) of the Act protects state and local government authority “to manage the public rights-of-way... to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁵⁵

State sovereignty is a core principle in our federal system. As then-Commissioner and now-Chairman Ajit Pai stated in his dissent to the Commission’s *2015 Municipal Broadband Preemption Order*, “usurp[ing] fundamental aspects of state sovereignty...disrupts the balance of

⁵³ 2017 Wireline Broadband Notice of Inquiry at 100-114.

⁵⁴ 47 U.S. Code § 253(b).

power between the federal and state governments that lies at the core of our constitutional system of government.”⁵⁶ When the U.S. Court of Appeals for the Sixth Circuit overturned the *2015 Municipal Broadband Order*, then-Commissioner and now-Chairman Pai applauded the Court’s decision for preserving “the rule of law and federalism.”⁵⁷ Democratically elected state and local governments have adopted laws regarding licensing, zoning, rights-of-way, approval processes, fees and cost recovery, among other issues, to protect the public trust over publicly-owned property, safeguard public safety and welfare, and enforce local land-use and zoning priorities. At its peril, the Commission usurps local and state authority adopted by democratically elected representatives tailored to local conditions in favor of one-size-fits-all policies.

There is absolutely no policy justification, as suggested by the *NOI*, for Commission preemption of state laws that require incumbent carriers to maintain adequate facilities and equipment or to have in place a written preventative maintenance program.⁵⁸ CWA is not aware of any state law that “restricts the retirement of copper facilities” and none are mentioned in the *NOI*. Those states that continue to require incumbent LECs to maintain carrier-of-last resort obligations do not require the incumbent LEC to meet that obligation over a copper network. Moreover, according to the National Regulatory Research Institute, 41 states have significantly reduced or eliminated oversight of wireline telecommunications and many states prohibit

⁵⁵ 47 U.S. Code § 253(c).

⁵⁶ Dissenting Statement of Commissioner Ajit Pai, City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., WC Docket No. 14-115, The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, WC Docket No. 14-116, March 12, 2015 (rel).

⁵⁷ Statement of Commissioner Ajit Pai on Sixth Circuit’s Decision to Overturn FCC’s Unlawful Municipal Broadband Ruling, Aug. 10, 2016 (“The Court’s decision is a big victory for the rule of law and federalism - a constitutional principle that lies at the heart of our system of government.”)

⁵⁸ *Id.* at 113.

regulatory authority over Voice-over-Internet-Protocol (VoIP) and/or IP-enabled services.⁵⁹

According to the National Regulatory Research Institute, state legislators have shifted their focus away from deregulating traditional providers and toward increasing broadband availability.⁶⁰

However, where state polities have maintained and/or reaffirmed public oversight over wireline communications and/or IP-enabled services, the Commission must respect those democratic decisions.⁶¹

As we discussed in Section III above, there are all too many communities, particularly in rural and low-income areas, where incumbent carriers see lower profits and have not upgraded their copper networks, yet where consumers have few, if any, alternatives to the legacy copper network for affordable, reliable voice and broadband service. In these locations, regulatory oversight is necessary to ensure adequate investment in repair and maintenance of the copper networks upon which these consumers depend. In these communities, the copper network is literally the lifeline for households, businesses, schools, and health facilities.

State service quality and maintenance requirements serve two important purposes consistent with Commission statutory obligations and broadband policy goals. First, as discussed in Section III, these policies serve to improve copper service to existing customers, making it more likely that copper-based DSL will be functional and delivered at a reasonable speed. Second, these policies give the incumbent local exchange carrier an incentive to install fiber as an alternative to

⁵⁹ CWA strongly believes that the same rules should apply to all voice service, regardless of the technology used to deliver that service.

⁶⁰ Sherry Lichtenberg, *The Year in Review 2016: Moving Past Reduced Regulation*, Silver Spring MD: National Regulatory Research Institute, Report No. 16-10 at iii (December 2016).

⁶¹ For example, the California legislature in 2016 defeated a bill that would have eliminated incumbent LECs' carrier-of-last-resort obligations (AB2395). In 2016, the Minnesota legislature (HF 160) preserved carrier of last resort requirements in its telecom reform legislation. In 2015, the Maryland PSC staff reaffirmed regulatory

repair of aging copper facilities. The New Jersey and Pennsylvania settlements discussed in Section III, which have their legal basis in state authority over facility maintenance, will result in increased investment in the copper network and opportunities to install more fiber if Verizon decides this is a more cost-effective way to deliver quality service to customers. Many states in the Verizon footprint regulate facility maintenance, yet this has not served as a deterrent to Verizon's deployment of its all-fiber network. According to Verizon's most recent earnings report, its FTTH network reaches more than 14.2 million households in the Northeast and Mid-Atlantic region, including many states that delegate statutory authority to regulatory commissions to ensure proper maintenance of voice networks to ensure quality service to consumers.⁶²

In summary, the Commission should not preempt state and local laws that require carriers to maintain adequate equipment and facilities. These laws do not serve as barriers to broadband investment and are protected by statutory authority granted to state and local governments in Section 253(b) of the Act. Further, the Commission should act with extreme caution in considering preemption of state and local government authority to manage and to receive fair and reasonable compensation for use of public rights-of-way, authority granted in Section 253(c) of the Act.

oversight over basic telephone service (Case PC-39). In 2016, three states adopted bills that included quality of service components, including Minnesota and Maine. *See* NRRI, *The Year in Review 2016*.

⁶² *See for example*, RI Gen. Law Sec. 39-4-4; Annot. Laws of Mass, ch 166 Sec. 14A (requires E911 maintenance), Sec. 32 (requires cities and towns to inspect wires to ensure that all above- and below-ground wires are adequately maintained and safe); NY Pub. Svc Law Sec. 98; PA cons. Stat. Sec. 1505. For FTTH citation, *see* Verizon, "Financial and Operating Information," Supplement to 1Q2017 Earnings Report, March 31, 2017 (<http://www.verizon.com/about/investors/quarterly-reports/1q-2017-quarter-earnings-conference-call-webcast>).

V. THE COMMISSION’S “FUNCTIONAL TEST” IS REQUIRED BY THE PLAIN LANGUAGE OF SECTION 214(A), BY ITS PURPOSE AND BY COMMISSION PRECEDENT

Congress enacted Section 214(a) to make sure that the people in communities that have relied on a particular service are not harmed by its discontinuance, reduction of service, or impairment and that the Federal Communications Commission will safeguard those community interests by reviewing carrier action before it occurs. That task is a critical part of encouraging technology transitions. New and better telecommunications services will serve the public, but Section 214(a) stands as a reminder that Congress has instructed the Commission to ensure that critical functions serving the public convenience and necessity must not be lost as other advantages are gained.

The Commission has promulgated rules to implement Congress’ intent, including a “functional test” that considers the circumstances of the affected community, the reliance placed on the discontinuing service, and the functionality of the replacement service, all in order to assure that a functionally equivalent service will remain available. To implement Section 214(a), the Commission requires that carriers must: (1) notify the community in which wireline service will be discontinued, reduced, or impaired, and (2) inform customers that the change in service – which requires Commission approval – will likely be granted absent a showing that the community would not be able to receive a reasonable substitute service. Residents are invited to file any objections with the Commission. Giving the community the opportunity to be heard is critical to the Commission’s consideration of whether granting the service change is in the public interest. Stripping down the Commission’s Section 214 protections, including the consideration of the community’s objections to the change, would be a dangerous disservice to communities,

particularly small towns and rural areas, where a functionally equivalent alternative service may not be available.

The question is starkly put. If a carrier is supplying a telecommunications service that is being used to support medical alert devices in a community, and it wishes to shift to a service that does not support the use of those medical alert devices, did Congress intend to allow the carrier to make the change in the dark of night without any required notice to the community or opportunity for the community to address the Federal Communications Commission prior to Commission review, or did Congress intend that a public process involving the community precede such a change?

This is not a hypothetical; it is exactly the circumstance that was presented when Verizon proposed to discontinue wireline telecommunications service on Fire Island and replace it with Voice Link wireless service that, Verizon warned, might not support “fax machines, DVR services, credit card machines, some medical alert devices, and some (but not all) other monitoring systems like alarm systems.”⁶³

⁶³ Verizon Second Response to Information, Data, and Document Request, *Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Services*, WC Docket No. 13-150 at 10 (September 4, 2013). The Communications Workers of America spoke out plainly to ensure that communities were not deprived of needed functionalities. See Comments of the Communications Workers of America, *Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Domestic Telecommunications Service*, WC Docket No. 13-50, 9-17 (July 24, 2013) (describing Voice Link’s deficient service and excerpting concerns voiced by public safety and elected officials, business owners, and NY residents. “Because Verizon implemented its landline discontinuance plan on Fire Island and the New Jersey barrier islands *before* it received approval from this Commission, we have real-world evidence that Voice Link represents a step backwards for consumers and a retreat from the Commission’s statutory obligations and policy goals to ensure universal, affordable communications and deployment of broadband services to all Americans.”); In addition, other commentators raised questions as to the reliability and functional operation of the proposed wireless service. See Chris Morran, *Verizon’s Test of Landline-less Service Leaves Some Customers Out In Cold*, Consumerist (July 10, 2013), <https://consumerist.com/2013/07/10/verizons-test-of-landline-less-service-leaves-some-customers-out-in-cold/> (reporting that local officials have called Verizon’s wireless alternative service, Voice Link, “sketchy, to say the least” and “an insult and a danger to our community”); *Plain Old Telephone Service (POTS) vs. Verizon Voice Link Wireless*, New Networks Institute, teletruth.org/POTSvsvoicelink.pdf (listing services not available on Voice Link, such as ATM machines, credit card processing, and guaranteed 911 connection service).

In Section 214(a) Congress provided the answer: “No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be threatened thereby.” Under the Commission rules, carriers are required to give written notice to each person whose service will be discontinued, reduced, or impaired. The notice must inform the customer of the details of the service change and must state that anyone may submit comments to the Commission regarding this change of service and its effects on the community as part of the Commission’s service discontinuance review process.⁶⁴

This statutory language and this administrative practice are necessary to ensure that the community, and the people in the community, has a chance to participate in the decision of whether the service on which they have relied will disappear. Yet, the Commission’s *NPRM* is curiously silent here; there is talk about potential burden on carriers but no discussion of the ability of the public to participate in a transparent way in a potential change of importance to them where they live or work. This omission – fueled by the proposition that on-the-ground reality must be ignored in favor of the sterile terms of a regulatory filing – conflicts with the language of the statute, its purpose, Commission precedent and the common-law. For the reasons set below, the Commission’s functional test must be retained.

First, the plain language of Section 214(a) focuses the Commission’s attention on “service to a community.” The choice of those words was not accidental. Where Congress wished to refer to

⁶⁴ 47 U.S.C. § 63.71 (requiring that the notice to customers must state that “The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected,” and that customers may submit objections to the service change to the Commission).

a tariff it did so.⁶⁵ But in Section 214, it made the different choice to use the term “service,” and it is a fundamental tenet of statutory construction that Congress’ use of one term over another must be given meaning.⁶⁶ The term “service” is not defined in the Communications Act, but there is no basis on which the Commission could conclude that it permits the reality of end-user experiences to be ignored. So, for example, the Supreme Court in *Brand X* emphasized the importance of considering the “consumer’s point of view” in determining the existence of a telecommunications service.⁶⁷ Similarly, in Section 522(6) the term “cable service” includes the “one-way transmission to subscribers of video programming”. Nothing in that definition requires that the cable system have filed a document with the FCC in order to define the service; nor is there any implication that government plays any role in pre-approving the video programming. Rather, the obvious conclusion is that the “video programming” is that which reaches the consumer. So, too, here the “service” includes the functionalities that consumers enjoy as they use the telecommunications service.

Second, the plain language of Section 214(a) ties the term “service” to the “community.” This is recognition by Congress that it is the “community” that should be the focus of the inquiry, a congressional purpose that has been furthered by the process by which communities can express their views to the Commission. The importance of understanding the impact on a community would be stricken from the statute, of course, if the community did not have any opportunity to review and comment upon the change of service.

⁶⁵ See U.S.C. § 203 (Schedule of Changes).

⁶⁶ *Securities Exchange Commission v. J.W. Barclay & Co., Inc.*, 322 F.3d 650 (9th Cir. 2006) (“It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words.”).

⁶⁷ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005).

Third, all of this explains why the Commission has historically looked to the real impact of services, or their change or discontinuance, on end-users – precedent that cannot be reconciled with the proposal that the language of tariffs should trump the reality of consumer experience. As the Commission explained in 2002 in a related context, “the statute and our precedent suggest a functional approach, focusing on the nature of the service provided to consumers” and “the functional regulatory approach is embodied in the Act’s classification of distinct service categories, such as ‘information services,’ ‘cable service,’ and ‘telecommunications services.’”⁶⁸

Fourth, none of this is altered in the slightest by the filed-rate doctrine or the Commission’s actions in *Carterphone* – both of which are raised in the *NPRM*. The filed-rate doctrine serves a distinct purpose, which is to allow the Commission to determine whether Section 202’s prohibition against unreasonable discrimination has been violated. But Section 214 does not ask whether different customers are being served differently; it asks whether a community is receiving service at all. As noted above, Congress could have used the kind of language found in Sections 202 and 203 if it had wished to conflate the two distinct inquiries, but the structure of the Communications Act shows that it did not. The limitations of Section 202 and Section 203 find their voice in distinct statutory provisions. That explains why when the Commission has forborne from tariffing requirements, it emphasized that the provisions of Section 214 continued to apply to the services being provided.⁶⁹

⁶⁸ *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, 3023 ¶ 7 & n.10 (2002).

⁶⁹ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, 18712, 18727 ¶¶ 11, 39 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47*

Similarly, *Carterphone* supports the use of the functional test. As the Commission has explained, “since its *Carterphone* decision, the Commission has acknowledged and supported the ability of consumers to use carriers’ services for purposes beyond those marketed by the carrier....”.⁷⁰ The *NPRM* notes the prospect that per *Carterphone* certain devices might have to be altered to be used,⁷¹ but the point in *Carterphone* was that devices could not be connected to the network that would harm the network itself.⁷² That rationale is entirely absent here; there is no prospect that a telecommunications carrier will be supporting functionalities, like fax machines, that it believes will harm its own operations. The inquiry here is focused on what the telecommunications carrier has voluntarily decided to bring to a community, and there is no suggestion in the *NPRM* – nor could there be one – that the use of the services has or will pose any threat to a community. Indeed, it is the continued and successful use of those different devices, like ATMs and alarm systems, on the network that is at the heart of the Section 214(a) inquiry.

Perhaps because any attempted reliance on tariffs as a substitute for the functional test must fail in the face of non-tariffed services that are subject to Section 214(a), the *NPRM* suggests that contracts can fill the gap. But contract law is an even weaker reed on which to rest reversal of the Commission’s current approach. Tariffs at least carry with them some indicia of governmental review, although far short of the community participation empowered by Section 214. But there is nothing in the language of Section of 214 that looks to contract law in any way. That makes

U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, Memorandum Opinion and Order, 22 FCC Rcd. 19478, 19485-86, 19500 ¶¶ 12, 38 (2007).

⁷⁰ *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications Technology Transitions*, Notice of Proposed Rulemaking, 29 FCC Rcd. 14968, 15017 ¶ 117 (2014).

⁷¹ 2017 Wireline Broadband NPRM at 118.

⁷² *Use of the Carterfone Device in Message Toll Telephone Service*, Decision, 13 FCC 2d 420, 423-24 (1968).

sense given the section's focus on the "community" and not on a single individual or business. A carrier can enter into customer-specific contracts⁷³ and contract law can differ by jurisdiction, making contracts a very confusing source by which to establish what is being discontinued in a community at large. Moreover, contractual terms can be subject to confidentiality obligations, for example between carriers and a business customer. That carriers now may be using uniform contracts with consumers is, of course, no answer; there is absolutely no indication in Section 214 that Congress intended the reach of this provision to be altered by the changeable contracting practices of carriers and, in any event, enterprise customers are also in the "community." Moreover, contract law is not as simple as the suggestion that a service agreement "defines [the carrier's] obligations,"⁷⁴ because the common-law of contracts looks to the course of conduct between the parties as relevant to both the existence of a contract and the terms contained in an express contract.⁷⁵ Thus, individualized terms, differing state laws, and the relevance of conduct to finally ascertain the parties' intentions not only makes contract law an unwieldy substitute for the functional test, but also reinforces the notion that Congress did not intend the federal interests established by Section 214 to turn on such variable factors. If Congress had wanted to have Section 214 defined by contract law, it would have said so.⁷⁶

⁷³ *CMC Telecom, Inc. v. Michigan Bell Telephone Co., d/b/a AT&T Michigan*, 637 F.3d 626, 628 (6th Cir. 2011) ("AT&T's retail offerings fall into two groups: published offerings and individualized contracts. Individualized contracts are designed for certain commercial customers based on a variety of customer-specific factors.").

⁷⁴ *2017 Wireline Broadband NPRM* at 117.

⁷⁵ See Arthur Linton Corbin, *Corbin on Contracts* § 26.01 (2017) ("A promise manifested by conduct instead of words is still an 'express' promise since its meaning is derived from a party's outward manifestation of intent, albeit in symbols other than words."); Restatement (Second) of Contracts § 4 (1981) ("Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.").

⁷⁶ Congress did refer to contracts in other sections of the Communications Act, which simply reinforces the point. See e.g., 47 U.S.C. § 201(b) ("nothing in this chapter or in any other provision of law shall be construed to prevent a

Against this, the *NPRM* suggests that less uncertainty would result from the use of tariffs (which as noted above cannot do the job in any event because of the existence of non-tariffed services) and contracts (which as noted above introduce elements of complexity without any concomitant evidence that Congress intended that they be relevant to Section 214). But there is something more to say – the risk of uncertainty is low in any event. There is nothing to suggest that carriers do not know how their services are being used, and, in fact, there is ample evidence to the contrary.⁷⁷ In any event, the paramount concern here is not to erase even the slightest bit of claimed uncertainty, the concern of Congress is that the people who live and work in a community, who – because of their businesses, or their medical care, or for the protection of their home, or for their safety – have relied on the continuation of a service traditionally available to them should have a chance to explain why the continuation of those functionalities serve the public interest. That opportunity is not a guarantee; nothing in these comments suggests that every possible function must be preserved or argues against the grant of any (much less all) Section 214 applications. But Congress has given communities the right to be heard and that right must be preserved.

In another section of the *NPRM*, the Commission asks whether “it would be appropriate for the Commission to conclude that Section 214(a) discontinuances will not adversely affect the

common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services”); 47 U.S.C. § 211 (“Contracts of carriers; filing with Commission”); 47 U.S.C. § 213(f) (stating Commission may request copies of property contracts); 47 U.S.C. § 215(c) (“The Commission shall examine all contracts of common carriers subject to this chapter which prevent the other party thereto from dealing with another common carrier subject to this chapter”); 47 U.S.C. § 219(a) (requiring carriers’ annual reports to include any changes to contracts); 47 U.S.C. § 226(a) (requiring providers of operator services to ensure “by contract or tariff” that each aggregator is in compliance with Commission rules); 47 U.S.C. § 228(c) (requiring carriers to establish contractual obligations with service providers to comply with Commission rules).

⁷⁷ See *supra*, note 63.

present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community.”⁷⁸ This inquiry misconceives the question posed by Section 214. It does not focus on technology – any technology might do the job – rather it asks whether, looking to the totality of the circumstances, the people are receiving the functionalities required by the public convenience and necessity.

In a similar vein, the Commission also proposes that a carrier may discontinue particular services without Commission approval “so long as the overall ‘service’ that a community receives is not discontinued, reduced, or impaired.”⁷⁹ This appears to be the reverse of the “tariff” suggestions but, where that approach is too small, this is too big. Indeed, the *NPRM*’s own description admits as much when it explains that “carriers must seek discontinuance authority separately for numerous ‘services,’ even when those offerings are related or similar and readily replaced with other offerings on the market.”⁸⁰ It would be inconsistent with the language and purpose of Section 214 to read out particular functionalities of the service to the community from the requirement in the statute to obtain Commission approval prior to discontinuing that service.

If the Commission bundles up “service” into the broad category that admittedly consists of different “services” that in some manner are merely “related to” or “similar” to a service, then the Commission will eviscerate the functional test in a manner incompatible with the Act’s use of the term “service”⁸¹ and impose a standard that, far from eliminating uncertainty, welcomes it with open arms. To take just one example, what would it mean that a service is “related to” another

⁷⁸ 2017 Wireline Broadband *NPRM* at 95.

⁷⁹ 2017 Wireline Broadband *NPRM* at 123. See Verizon Second Response to Information, Data, and Document Request, *supra* note 63.

⁸⁰ 2017 Wireline Broadband *NPRM* at 123.

⁸¹ See *supra* note 68 and related text including statutory definitions.

service? Under this definition two tin cans connected by a string could replace traditional telephone service. It would allow carriers to drop central service functionalities (such as guaranteed 911 connection service and the ability to function with alarm systems, medical devices, and credit card processing machines)⁸² without Commission review and despite widespread community objection.

In sum, the functional test is neither too small nor too big. It is just right. People are what make a community, and it is their usage that must remain the touchstone of the Section 214(a) inquiry.

VI. CONCLUSION

CWA fully supports Commission action to encourage and accelerate investment in high-speed networks serving all Americans. The Commission should encourage incumbent LECs to upgrade their networks and should not require ILECs to maintain two networks indefinitely. But the questions raised in this proceeding are misplaced. The *Technology Transition* rules are working to advance broadband investment while preserving and promoting the Commission's enduring values of universal service, public safety, consumer protection, and competition. Rules that require incumbent carriers to provide consumers clear, sufficient, and timely advance notification of copper retirement and Section 214 discontinuance provisions that ensure there is an adequate replacement prior to discontinuance or impairment of legacy services together facilitate technology transitions by giving people the education and time they need to prepare and the reassurance that they will not be left with inferior service after the change. Commission preemption of state and local statutes that protect and promote quality networks would

⁸² Verizon Second Response to Information, Data, and Document Request, *supra* note 63.

undermine the longstanding federal/state partnership that protects and advances quality, universal service – including high-speed broadband service – to all Americans. Finally, the Commission should respect the authority of local and state governments to enact rules and regulations that protect the public trust over public rights-of-way.

Respectfully Submitted,

A handwritten signature in black ink, reading "Debbie Goldman", written over a horizontal line.

Debbie Goldman
Communications Workers of America

June 15, 2017